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No. 83-1535

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

v.

RODRIGO LUIS OLIVAS-MONORREZ,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May the Immigration and Naturalization Service use in deportation proceedings evidence its agents obtain through random automobile stops without probable cause in violation of the Fourth Amendment?

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STATEMENT OF THE CASE

Respondent Rodrigo Olivas, in his deportation proceeding, tried unsuccessfully to prevent the use of evidence unlawfully obtained by the Immigration and Naturalization Service during a random automobile stop not based upon probable cause.

On April 14, about 9:00 a.m., the Respondent Rodrigo Olivas was going to work in the Yakima Valley of the State of Washington, when the vehicle in which he was a passenger was pulled over by agents of the Immigration and Naturalization Service. Officer Spence, testifying on behalf of the Immigration Service at the suppression hearing, could not recall any of the details of this particular stop. He only "vaguely remember(ed) them being inside a vehicle. . ." (A.R. 29). Upon cross examination, Officer Spence

admitted that documented persons were also stopped by him as part of his regular operations in the area. (A.R. 9, 33).

The Respondent, Rodrigo Olivas, testified at his deportation hearing that he was in an automobile belonging to David Hernandez, going to work, when they were stopped. They had just left one job and were going to another. He testified that after they had crossed an interesection, an automobile on the crossroad turned in behind them and began to follow them. After a while the automobile turned on its lights and signaled for them to pull over to the side of the road. He stated that the vehicle in which he was riding was going at a normal rate of speed and that to his knowledge nothing was mechanically wrong with the automobile (A.R. 23). David

Hernandez also testified to substantially the same events (A.R.27). Both the passenger and the driver testified that they didn't know why they were stopped but had believed that the car which pulled them over was a police car. It was not until the officers asked Mr. Olivas for his immigration papers did they realize they were INS agents (A.R. 25, 28) The Respondent, Mr. Olivas, and Mr. Hernandez were taken to the Wapato Police Station, where Mr. Olivas was questioned by Officer Spence and the I-213, Record of Deportable Alien, was filled out. During the deportation proceeding, the INS Trial Attorney introduced the I-213 to prove alienage. Respondent's counsel moved to suppress the I-213 as being the tainted result of an unlawful arrest. The administrative law judge refused to suppress the I-213,

finding that the respondent failed to meet his burden of establishing an illegal arrest. The A.L.J. found: "However, Border Patrol Agent Spence could not remember the incident and there may have been articulable facts which led to their being stopped and questioned. However, even if the arrest was illegal, the exclusionary rule does not apply to a deportation proceeding, which is civil and not criminal in nature." (Emphasis supplied.) (A.R. 10).

On appeal, the Board of Immigration Appeals affirmed, citing Matter of Sandoval, 17 I. & N. Dec. 70 (BIA 1979).

On petition for review of Respondent Olivas's deportation order, the 9th Circuit, in a memorandum decision, granted the petition, and reversed based upon Lopez-Mendoza and Sandoval-Sanchez v. INS, 705 F.2d 1059 (9th Cir 1983)(en

banc)(cert. granted, No. 83-491, January 9, 1984, argued April 18, 1984) and remanded to give the Board of Immigration Appeals the opportunity to decide whether the I-213 form should be suppressed and, if so, whether there is other sufficient evidence establishing a prima facie case of alienage.

REASONS FOR DENYING THE PETITION

The decision below is a two page unpublished memorandum opinion which follows well established precedent, as to both the Fourth Amendment violation (U.S. v. Brignoni-Ponce, 422 U.S. 873 (1975), and the resulting remedy (remand to Board of Immigration Appeals for further proceedings in light of Lopez Mendoza and Sandoval Sanchez v. INS, supra). The INS's sole reasons for seeking certiorari is to "hold this case" until this Court renders a decision in Lopez Mendoza and Sandoval Sanchez. (Pet. 4). The INS's four page petition for writ of certiorari is completely unecessary, is a waste of the Court's time and resources, and amounts to an abuse of process by the INS in seeking the writ purely for reasons of delay.

More importantly, the dramatic facts of this case underscore the need for the court to maintain a measure of control over the INS through the use of the exclusionary rule. Rodrigo Olivas and David Hernandez were going to work in a rural area of the State of Washington when the INS pulled them over to check their papers. Nothing in the record even suggests that the INS agents had any cause, other than Olivas' and Hernandez's Hispanic appearance to justify the stop.

This Court long ago established the requirement that law enforcement officers "must be able to point to specific and articulable facts" of illegal conduct to justify a detention. Terry v. Ohio, 392 U.S. 1, 21, n. 18 (1968). (See also, United States v. Cortez, 449 U.S. 411, at 417, investigative stops "must be justified by some objective manifestation

that the person stopped is, or is about to be, engaged in criminal activity.") Officer Spence, testifying on behalf of the INS, could only "vaguely remember" their being inside their car when stopped. (A.R. 29).

This Court also established that INS could not, consistent with Fourth Amendment standards, conduct roving patrols near the Mexican border and question occupants of vehicles concerning their immigration status and citizenship where the occupant's apparent Mexican ancestry furnished the only ground for suspicion that the occupants were aliens. U.S. v. Brignoni-Ponce, 422 U.S. 873 (1975). Here the INS was conducting its operations 1500 miles from the Mexican border (A.R. 9, 30); six INS agents apprehended 280 undocumented aliens during a one week period. (A.R. 9,32,33).

These figures strongly suggest a dragnet operation unrestrained by considerations of cause. Officer Spence admitted that they also stopped and questioned workers who were legally in this country during this operation. (A.R. 9,33). According to the 1980 census, 85% of the Hispanic population of the State of Washington are U.S. citizens.[1] Undoubtedly, some Hispanic citizens and lawful permanent residents were stopped and questioned

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1 Of the total population of 4.1 million persons residing in Washington, 121,286 are of Hispanic origin, and 17,212 are non-citizens. 1980 Census of the Population, Vol. 1, Characteristics of the Population, Ch. D. Detailed Population Characteriestics, Part 49, Washington, Section 1. Table 194.

because of their common racial, ethnic, linguistic and cultural characteristics which they share with the undocumented Mexican population.

The Fourth Amendment, as interpreted by this Court, lays down standards governing the conduct of law enforcement officials when they stop, question, detain, interrogate and arrest persons within the jurisdiction of the United States. This Court has fashioned a rule, the exclusionary rule, to assist it in assuring that those standards are followed by law enforcement personnel. Without the exclusionary rule, the Court does not have an effective tool for defining what the Fourth Amendment requires of law enforcement personnel and what penalties flow from its violations.

The law enforcement officers involved in this case are immigration officers. INS officials use their police authority to stop, question, detain, interrogate and arrest for deportation those whom they suspect violated the immigration laws. INS apprehends about 7.5% of those it questions concerning their immigration status.[2] INS rarely prosecutes an alien solely for illegal entry.[3] Thus, although the Court can

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2 U.S. Department of Justice, 1979 Annual Report of the Immigration and Naturalization Service, table 1, pg. 15.

3 The Department of Justice criminally prosecutes less than 2% of those aliens the INS apprehends. Id. at Table 5, pg. 20. The great majority of the reported convictions for illegal entry are the result of plea bargains where more serious offenses were originally charged.

delineate Fourth Amendment standards, the INS can and does (as this case shows) effectively ignore those standards; and the Court, unless the exclusionary rule is applied in immigration deportation proceedings, will be effectively powerless to protect the rights of citizens and aliens alike.

Respondent will not here reargue the merits of the exclusionary rule except to say that the arguments in favor of the rule are much stronger in the immigration context than in almost any other from a

Hispanic perspective.[4] Hispanic citizens and aliens, both documented and undocumented, are entitled to the full protections of the Fourth Amendment. See, e.g., U.S. v. Brignoni-Ponce, supra. But Hispanic citizens who share the same physical characterists as the documented and undocumented immigrants with whom they live and work are the least able to fully assert their constituional rights because of the lack of education, political sophistication and financial resources. For Hispanics, the threat of being stopped by an INS officer because

4 Those arguments are fully set out in the brief for Respondents Lopez Mendoza and Sandoval Sanchez in No. 83-491, and are adopted here by Respondent Rodrigo Olivas-Monorrez.

he may have an inarticulate hunch that the Hispanic is an undocumented alien is a reality of daily existence in many areas of this Country. Only this Court's vigilant safeguarding of the Fourth Amendment rights of all the people through the application of the exclusionary rule will this Country remain a Nation of laws.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted

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